



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, NY 10007-1866

MAY 17 2017,

BY EMAIL AND REGULAR MAIL

To: See List of Addressees – Attachment A

Re: Diamond Alkali Superfund Site, Lower 8.3 Miles of Lower Passaic River,
Essex and Hudson Counties, New Jersey

Dear Sir/Madam:

On March 30, 2017 the U.S. Environmental Protection Agency (the “EPA”) notified 20 parties that EPA had identified them as candidates for an early cash out settlement related to their potential liability for Operable Unit 2 (“OU2”) of the Diamond Alkali Superfund Site (the “Site”). On that same date, EPA wrote to all of the potentially responsible parties (“PRPs”) for OU2 notifying them of, among other things, EPA’s early cash out offer to the 20 parties. Since then, EPA has been contacted by several PRPs requesting information on EPA’s proposed early cash out offer and requests to be included in the early cash out settlement.

EPA’s decision to offer an early cash out settlement to 20 parties is based on a number of factors, tied to the remedial action selected in the Record of Decision (“ROD”) issued for OU2.

Lower 8.3 Miles of the Lower Passaic River – OU2

On March 3, 2016 EPA issued the OU2 ROD to address unacceptable risks to human health and the environment posed by contaminated sediments in the lower 8.3 miles of the Lower Passaic River. While EPA has identified many hazardous substances in the lower 8.3 mile sediments, the ROD explains that eight hazardous substances pose the greatest potential risks to human health and the environment in the lower 8.3 miles. Those eight hazardous substances, namely, polychlorinated dibenzo-*p*-dioxins and furans (“dioxins/furans”), polychlorinated biphenyls (“PCBs”), mercury, dichlorodiphenyltrichloroethane (“DDT”) (and its primary breakdown products), copper, dieldrin, lead and polycyclic aromatic hydrocarbons (“PAHs”), are identified in the OU2 ROD as the contaminants of concern (“COCs”) for OU2. Accordingly, the objectives of remedial action selected for OU2 (see Section 8 of the OU2 ROD) are to:

- Reduce cancer risks and noncancer health hazards for people eating fish and crab by reducing the concentrations of COCs in the sediments of the lower 8.3 miles.

- Reduce the risks to ecological receptors by reducing the concentrations of COCs in the sediments of the lower 8.3 miles.
- Reduce the migration of COC-contaminated sediments from the lower 8.3 miles to upstream portions of the Lower Passaic River and to Newark Bay and the New York-New Jersey Harbor Estuary.

Early Cash Out Settlement Recipients

Prior to the issuance of the ROD, EPA received many requests from parties wishing to be considered for cash out settlements, presenting arguments and information in support of such settlements. In particular, certain parties argued that their legal exposure for the Site was such that the transaction costs for them to remain within a group of performing parties were disproportionate to their liability. EPA also received information that the Lower Passaic River Study Area Cooperating Parties Group (“CPG”) was unwilling to undertake an allocation.

Based on the above, EPA reached several conclusions. One was that it would be useful for EPA to create a settlement framework to resolve the liability of parties that might be eligible to be cashed out from further OU2 work. Another was that this process would be sufficiently complex that in the interim it would be appropriate to offer a first, early cash out to those parties not associated with a release or disposal of a COC into the Lower Passaic River. The early cash out settlement would allow the parties to pay a sum certain to EPA and in return receive a covenant not to sue from EPA for OU2 as well as contribution protection related to OU2.

The parties that EPA identified as eligible for an early cash out settlement are those that, based on information reviewed by EPA, are not associated with the release or disposal of any of the COCs for OU2, as identified in the ROD, into the Lower Passaic River. Given the scope of the OU2 remedy, a remedial action that is expected to cost close to \$1.4 billion dollars, the Agency has taken great care in identifying parties eligible for the settlement. For the proposed settling parties, the documents that EPA relied on are posted on the Diamond Alkali Superfund Site web site¹. EPA also considered the “Tierra Solutions' Nexus Documents”² that were made available as part of the New Jersey Department of Environmental Protection’s (NJDEP’s) Passaic River Litigation. As proposed by EPA, each of the proposed settling parties would pay the same amount (\$280,600). The settlement payment takes into account the cost of the remedial action, and EPA’s policy requiring a premium to account for uncertainties associated with the cost of the future work.

EPA’s goal in offering this settlement was to remove these 20 parties from the OU2 RD/RA process. It is important to note that EPA’s settlement offer is limited to liability associated with releases or disposal from the identified facilities. If EPA learns that a party receiving an early cash out offer is responsible for another facility that released hazardous substances to the Lower Passaic River, potential liability associated with that other facility would not be covered by this cash out settlement. However, it is also important to understand that EPA’s goal was not to settle

¹ <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.scs&id=0200613>

² <http://www.nj.gov/dep/passaicdocs/thirdparty-tierra.html>

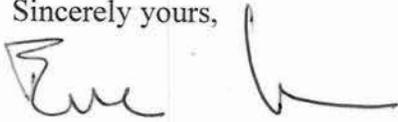
parties out piece-meal, i.e., one facility at a time, but rather to identify the parties that could be released from OU2 altogether.

Some PRPs that did not receive the cash-out offer have contacted EPA to explain that they are similarly situated to certain proposed cash-out parties, and have argued that by analogy, they too should have received such an offer. If an early cash out settlement has not been offered by EPA to a PRP, it is because EPA could not determine with confidence that the PRP met the criteria for this early cash out settlement. Such PRPs may be considered by EPA for another cash out opportunity.

Moreover, if someone is aware of reasons that a proposed settling party should not have been included, that information should be provided to EPA. If evidence exists connecting a proposed settling party with a release of COCs to the Lower Passaic River, EPA will consider that information and evaluate whether to remove the party in question from the proposed cash out settlement. However, we do not expect to engage in an additional round of document review and negotiations aimed at expanding the parties subject to an early cash out settlement.

Rather, in order to address these complexities, as indicated in EPA's March 30, 2017 "Next Steps" letter to the PRPs, EPA intends to use the services of a third party allocator with the expectation of offering cash out settlements to additional parties. Thus, parties that have not received an early cash out settlement offer from EPA may still be able to participate in a cash out settlement for OU2 with EPA in the future.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Eric J. Wilson". The signature is written in a cursive style with a large initial "E" and a long horizontal stroke at the end.

Eric J. Wilson
Deputy Director for Enforcement and Homeland Security
Emergency and Remedial Response Division

Attachment A - List of Addressees

Diamond Alkali Superfund Site

Lower 8.3 Miles - Passaic River

Company	Contact Information	Facility
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